Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ATANACIO G. SAMBRANO
and CATHLEEN R. SAMBRANO,
Petitioners

v.

HERITAGE TRAILS HOMEOWNERS ASSOCIATION,
An Illinois not-for-profit corporation,
Respondent

On Petition For Writ Of Certiorari
To The Appellate Court of Illinois
Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. **Attorneys Fees and Costs**

On May 10, 2005 the circuit court of the 19th circuit, Lake County, Illinois, entered an Order in Case Number 00 CH 981 awarding reasonable attorney's fees and costs in favor of the respondent to be determined at a hearing on these issues.

On October 17, 2005 the trial court entered a judgment in favor of the respondent ordering the petitioners to pay the respondent **$48,732.75** in attorneys fees and **$4,837.55** in expenses and costs or a total of **$53,570.30**.

The Appellate Court of Illinois Second Judicial District affirmed the judgment of the trial court in its Rule 23 Order dated July 14, 2006 in Case Gen. Number 2-05-1102.

The question presented for review is whether the respondent, the trial court, and the appellate court, singly or jointly, can hold the petitioners legally liable to pay attorneys fees and costs **based solely on a resolution** precipitately passed by the Board of Directors of the respondent in the course of an ongoing litigation between the petitioners and the respondent.

2. **In-Ground Swimming Pool Barrier**

The petitioners installed an in-ground swimming pool on their lot with barriers that conformed to the barrier requirements of the Village of Lindenhurst but did not conform to the fencing regulations of the respondent. A **conflict** exists between the barrier requirements in the ordinance of the Village and the fencing regulations of the respondent, including but not limited to whether a Declaration of Covenants in a subdivision shall prevail and control the Village ordinance with regard to barrier/ fencing restrictions and requirements.

The question presented for review is whether the Village barrier requirements for in-ground swimming pools should give way to the fencing regulations of a corporate respondent in ways that such regulations supersede the barrier ordinance of the Village.

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CITATIONS

The Illinois Appellate Court Second District, in its Rule 23 Order entered on July 14, 2006, in Appellate Case Number 2-05-1102, justified the award of attorneys fees and costs in favor of the respondent citing a portion of Article IV, section 4.02 (Assessments) of the respondent's Declaration of Covenants which reads: "Assessments may be levied for the purpose of paying *** contractual expenses of administering the Association and enforcing the provisions of this Declaration, including without limitation, *** fees of attorneys xxx." (Page A-10, Rule 23 Order).

The Appellate Court also cited Article IV, section 4.03 (Levying of Assessments) of the respondent's Declaration of Covenants which reads: "The sums required to pay the costs described in Section 4.02 above shall be **allocated equally among all the lots** or in such other reasonable manner as the Board may determine." (Page A-10, Rule 23 Order).

The Appellate Court concluded that the resolution of the respondent's Board of Directors dated December 13, 2000 is within the Board's power under section 4.03. (Page A-10, Rule 23 Order); that the Board acted within its authority in adopting the resolution. (Page A-10, Rule 23 Order). The question presented for review regarding the granting of attorneys fees and costs based solely on a resolution is a matter of important public concern that, if decided with finality in this precedent-setting case, will ultimately establish a rule for future conduct by intra-state courts as well as inter-state courts. As of now there is a **conflict** between the decision rendered by the Appellate Court of the State of Maryland and the Appellate Court of Illinois with respect to the issue of attorneys fees by resolution. In the case of Brian Campbell v. Lake Hallowell Homeowners

Association, the Maryland Court of Appeals **denied** the award of attorneys fees based on a resolution that was **improperly passed** for not having complied with the amendment provisions of the Asso[illegible]on's Declaration of Covenants requiring that the declaration may be amended within the first 30-year period by an instrument signed by not-less-than 90% of the Lot Owners and thereafter by an instrument signed by not-less-than 75% of the Lot Owners.

The Maryland court held that the resolution was outside the scope of the Declaration of Covenants of the Association. The same or similar facts were involved in this case between the petitioners and the respondent, and yet the Illinois Appellate Court's Rule 23 Order of July 14, 2006 **granted** attorneys fees to the respondent based on a resolution of the Board of Directors that was **improperly passed** as an amendment to the Declaration of Covenants without an instrument executed by not-less-than 75% of the members as required under Article VIII, 8.02 of the respondent's Declaration of Covenants. Both resolutions in the Maryland case and the Illinois case were improperly passed and yet the Maryland court denied the award of attorneys fees while the Illinois court granted the award of attorneys fees despite the lack of statute or agreement between the parties. The **denial** of attorneys fees by one state court and the **granting** of attorneys fees by another state court is a conflict that will continue to multiply until this issue is resolved with finality by this Court which is the final arbiter of conflict between and among state courts.

The Appellate Court went on saying: **"Our research has uncovered no cases in this state or elsewhere in which a homeowner's association was permitted to recover attorney's fees based solely on a resolution."** This manifestation corroborates the petitioners' contention that the matter of

attorneys fees by resolution is a virgin issue in a gray area of jurisprudence.

With regard to the conflict between the in-ground pool barrier requirements and respondent's fencing restrictions, the Appellate Court ruled that there was no conflict and that the building code of the Village will control only when it is more stringent or is in conflict with the respondent's Declaration. (Page A-8, Rule 23 Order).

BASIS FOR JURISDICTION

The judgment of the Illinois Appellate Court Second District sought to be reviewed was its Rule 23 Order in Case Number 2-05-1102 which was entered on July 14, 2006. A copy of the Order appears in Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

REGULATIONS INVOLVED

Re: Attorneys Fees and Costs

With regard to the question on attorneys fees and costs, Article IV (Assessments) section 4.02 should be construed in reference to section 4.03 and not be taken independently. It should be interpreted in reference to section 4.03. Pertinent portion of Article IV section 4.02 provides:

"In addition, assessments may be levied for the purpose of paying contractual expenses of administering the Association and enforcing the provisions of this Declaration, including without limitation xxx attorneys fees. xxx Assessments may be levied for such other purposes of the Association as the Board shall from time to time determine upon approval of two-thirds 2/3 of the members."

Article IV section 4.03 of the respondent's Declaration of Covenants (levying of assessments) provides: "The sums required to pay the cost described in section 4.02 shall be"**allocated equally among all the lots** or in such other reasonable manner as the Board may determine."

The respondent's Board of Directors resolution of December 13, 2000 provides:

"All reasonable attorneys fees arising out of a default by any owner, his tenant, invitee, or guest in the performance of the provisions of the governing documents of the Association, Rules and Regulations, or any applicable statute or ordinance, including, but not limited to the collection of assessments and fines, enforcing the covenants, By-Laws and Rules and Regulations or representing the Association relative to actions brought or threatened to be brought **against it** by the homeowner shall be added to and deemed a part of said homeowner's respective share of the common expense."

Article VIII (Miscellaneous) section 8.02 (Amendment) of the respondent's Declaration of Covenants provides:
"The provisions of this Declaration may be amended by an instrument executed by not less than seventy-five percent (75%) of the members; provided however, during such time as the Declarant is an owner of any lot, provisions relating to the rights and obligations of Declarant and Developer may not be amended without the written consent of Declarant and Developer. The responsibility for continued maintenance, operation and preservation of the Common Area shall not be abrogated by any such amendment. In addition, any amendment of any part of Articles III, VI or VIII shall require the prior written approval of the Village."

Article III refers to property rights, Article VI refers to restrictions on use of lots, and Article VIII refers to miscellaneous provisions of the Declaration. Article VIII sections 8.02 refer to requirements for amending the Declaration.

Re: Fencing Regulations

Article VI (Restrictions on Use of Lots) section 6.02(d) provides: "The only type of fencing allowed on a lot shall be 5-foot board-on-board type fencing constructed of cedar with at least 30% of the fence surface area consisting of open air." Article VI section 6.04 (Primacy of Village Ordinances and Plat) provides: "In the event any ordinances of the Village of Lindenhurst are more **stringent**, or if any such ordinances or the plat **conflict** with any of the provisions hereof, **the ordinances of the Village and the Plat shall prevail and control**."

Section 421.10.1 of the BOCA National Building Code of 1996, referring to outdoor private swimming pools, spas and

hot tubs, which was adopted in ordinance of the Village, which included in-ground, above-ground or on-ground pool, hot tub or spa enumerates no less than ten (10) requirements for barrier enclosures on in-ground pools. These ten requirements sufficiently prove that section 421.10.1 is not only in **conflict** with Article VI section 6.02(d) of the respondent's Declaration of Covenants but is also more **stringent** than section 6.02(d).

The **conflict** between the BOCA Code and Article VI section 6.02(d) of the Declaration of Covenants is best explained by looking at Section 421.10.1, paragraph 4 of the BOCA Code, specifically requiring in-ground pool barriers to be composed of horizontal and vertical members and the distance between the tops of the horizontal members less than 45 inches (1143 mm) etc. There is no such requirement under the Declaration of Covenants. Furthermore, the Declaration of Covenants allows the construction of three horizontal rails in the subdivision which is a direct violation of the BOCA Code specifically requiring only two rails. On the **stringent** issue, the BOCA Code specifically requires the following under Section 421.10.1, paragraph 9: paragraph 9.1 requires an alarm which produces an audible warning; paragraph 9.2 requires that the pool be equipped with a self-closing and self-latching door/gate device; paragraph 9.3 requires that the pool be equipped with a power safety cover. None of these are required under the Declaration of Covenants which suggests a conclusion that the BOCA Code barrier requirements are more rigid and more stringent than the fencing requirements of the subdivision. Based on this explanation, and since a contract is the law between parties, Article VI section 6.04 of the Declaration requiring primacy of Village requirements in case of conflict should have been upheld by the lower courts. **This issue is paramount for it involves safety issues that may result in injury and even death.** The petitioners had complied with all the BOCA requirements in the construction and completion of their in ground swimming pool.

STATEMENT OF THE CASE

On August 18, 2000, the petitioners filed with the circuit court of the Nineteenth Judicial Circuit, Lake County, Illinois, an action for injunctive and other relief praying for preliminary and permanent injunction enjoining the respondent from attempting to conduct violation hearing scheduled for August 22, 2000. On August 7, 2002, the respondent filed its two-count Second Amended Counterclaim for declaratory injunctive and other relief. On May 10, 2005, the trial court entered its final judgment granting declaratory relief and injunctions requested by the respondent. The trial court awarded to the respondent reasonable attorneys fees and costs and ordered the petitioners to remove the wrought-iron fence constructed around their in-ground swimming pool by May 22, 2005 or construct a fence which conforms to the rules of the respondent and the Village of Lindenhurst ordinances.

The petitioners filed with the Illinois Appellate Court Second Judicial District a timely appeal from the May 10, 2005 final judgment of the trial court, docketed as Appellate Case Gen. Number 2-05-0489. On January 26, 2006, the Appellate Court entered its first of two Rule 23 Orders DISMISSING the petitioner's appeal for lack of jurisdiction as the May 10, 2005 order appealed from was not a final and appealable order as it left open the issue of the amount of attorneys fees the petitioners would be required to pay.

On October 17, 2005 the trial court issued a judgment in Case Number 00CH981 directing the petitioners to pay the respondent **$48,732.75** in attorneys fees and **$4,837.55** in expenses for costs, or a total of **$53,570.30**. The petitioners filed a timely appeal of this October 17, 2005 judgment of the

circuit court to the Illinois Appellate Court Second District, docketed as Appellate Case Gen. Number 2-05-1102. On July 14, 2006 the Appellate Court entered its second Rule 23 Order disposing the case on the merits and affirming the May 10, 2005 and October 17, 2005 orders of the trial court.

On August 16, 2006 the petitioners filed with the Illinois Supreme Court a Petition for Leave to Appeal from the Appellate Court's Rule 23 Order of July 14, 2006 pursuant to Illinois Supreme Court Rule 315 as amended. This petition was docketed as Case Number 103228. On November 29, 2006 the Illinois Supreme Court DENIED the petitioner's Petition for Leave to Appeal. A copy of the denial is in Appendix E.

ARGUMENT

I. Attorneys Fees

The award of attorneys fees by board resolution raised a particularly significant question of law that is **not settled by jurisprudence in Illinois and elsewhere according to the Illinois Appellate Court**. Lack of precedent begs considerable importance for this Court to grant writ of certiorari. Lack of precedent imbues inherent significance of the question presented for review as it calls for a judicial opinion that will ultimately settle this question of law by precedent. Lack of precedent would provide strong motivation for numerous boards of directors in every subdivision and in every state in the entire country to pass similar resolutions every time confrontations between homeowners and subdivisions develop into a full-blown litigation. Lack of case law precedent leaves every homeowner in a subdivision completely at the mercy of the Board of Directors of every homeowner association. Lack of case law precedent will open the door to the proliferation of conflicting non-precedential Rule 23 Orders with some Appellate Courts granting

the award of attorneys fees while others deny the award. It also grants blanket discretion to State Courts to grant or deny attorneys fees as they please with or without self serving board resolutions.

This issue if of importance beyond the particular facts and parties involved. The decision on this issue had nationwide impact on all subdivision business in every state in the country and in all state courts. Whether this foreseeable pattern of behavior will gain momentum or be avoided depends on the dispositive action taken by this Court in this instant petition for writ of certiorari. These broad considerations provide enough merit for the petition that needs to lay a precedent to prevent gray areas on questions of law of this magnitude.

Article IV section 4.01 of the respondent's Declaration of Covenants refers to personal obligations of lot owners to pay assessments levied to pay for the various types of common expenses under Article IV section 4.02 which expenses are **equally allocated** among all lots under Article IV section 4.03. The resolution in question is an amendment to Article IV sections 4.02 and 4.03 of the Declaration of Covenants. The resolution enlarges the scope of the "common expenses provisions" of section 4.02. The resolution deletes the allocation clause under section 4.03.

For a number of reasons the resolution is invalid and unenforceable:

- It was not in a written instrument executed by not less than 75% of the members to be a valid amendment under Article VIII section 8.02 of the Declaration of Covenants;
- It was passed in violation of Article VIII section 8.02;
- It was an ultra vires act of the respondent as it was outside the powers and duties of the Board of Directors under Article VII sections 7.01 and 7.02 of the By-Laws of the respondent;

- It was not approved by two-thirds 2/3 of the members required under Article IV section 4.02;
- It was not legally binding upon any homeowner in the subdivision, including the petitioners for it was never recorded to be a real covenant with the Register of Recorder to be a valid amendment of the Declaration;
- It was not a contract and could not be made the basis of contractual liability binding on the petitioners or any homeowner;
- The Board has no authority to change rules immediately binding upon any homeowner engaged in litigation with the respondent;
- The resolution was a unilateral novation of the rights of the respondent and the obligations of the petitioners;
- It violated Article XVI amendment provisions of the By-Laws for it was not ratified in writing by owners representing no less than 50% of the lots;
- The Board has no power to create creditor/debtor relationship by a mere resolution which is neither a contract nor a statute;
- It lacks equity and made a mockery of equal justice under the law in the sense that the petitioners cannot recover attorneys fees and costs without a contract or statutory basis, and yet the resolution which is not a contract allows the respondent to recover;
- The resolution turned the scales of justice upside down as it held the petitioners liable to pay so much for minor defaults while the respondent does not have to pay a penny for its major defaults.

These 12 substantial reasons prove that the respondent violated specific provisions of its own contract, a take-it-or-leave-it contract it seeks to enforce against the petitioners but refuses to enforce against itself.

There are major defaults documented by evidence on record showing the adamant reluctance of the Board to effectively

"enforce the provisions of the Declaration" within the thresholds of Article IV section 4.02 with the same level of temerity in meeting the hazards of litigation it had taken against the petitioners. There is evidence on record that there were no less than **fifty-one (51) existing and pre-existing** violations by other homeowners of one race and not one of them was brought to court. One violation is minor but fifty-one minor violations amount to a major default. Selective enforcement of the provisions of the Declaration of Covenants is a major default by any tortured definition, not to mention the Board's breach of fiduciary duty to all homeowners to act reasonably and fairly pursuant to the ruling of the court in the case of Wolinski v. Kadison cited hereunder.

The petitioner's isolated defaults turned insignificant when compared to the Board's insidious breach of fiduciary duty, and their minor defaults became negligible compared to the disastrous consequences of selective enforcement practices. The Board's **timidity** in effectively enforcing fifty-one existing and pre-existing violations of the Declaration it was required to do under Article IV section 4.02 and its **temerity** in effectively enforcing the petitioner's minor defaults under the same section are boarded major defaults bordering on breach of fiduciary duty and selective enforcement practices which are a deadly combination of business mixed with pleasure. There is nothing in the resolution, nothing in the governing documents of the respondent in which any and all homeowners can successfully hold the respondent liable to pay fines and penalties for its defaults. And there is nothing in the governing documents showing that the respondent's Board of Directors can be held liable to pay the costs of litigation and attorneys fees for breach of fiduciary duty or violations of contractual obligations of the respondent.

The amount of $53,570.30 in attorneys fees and costs is a huge amount to be considered "reasonable" under Article IV section 4.03 of the Declaration of Covenants. This amount could hardly be justified as a "fair share" of a single homeowner in the common expense provisions of section 4.02. What is reasonable under section 4.03 must have been understood by the Board to mean "unconscionable" on account of its resolution requiring the petitioners to pay all attorneys fees, win or lose, as a punitive measure in suing the respondent. For the Board to make a holy cow of the respondent does not measure up to the word "reasonable." The Appellate Court's conclusion that the resolution was within the Board's power, and that the Board acted within its authority in adopting the resolution had no basis in fact and in law.

Absent a contractual or statutory basis for liability to pay attorneys fees and costs, the respondent saw a need to create a basis for liability **through board resolution**. No where in the entire proceedings of the trial court did the judge mention the words "board resolution." The attorney for the respondent, who prepared the draft of the May 10, 2005 Order of the trial court, saw an opportunity to edit the Order to fit his ends. Item 1 of the May 10, 2005 Order reads in part: "That Atanacio Sambrano and Cathleen Sambrano xxx are bound by xxx board resolutions." The attorney for the respondent furtively inserted the two words "board resolutions" to give imprimatur of judicial authority that laid the predicate for the resolution to justify his post-judgment petition for attorneys fees and costs. Manufactured evidence admitted into evidence through sneaky legal engineering tainted the award of attorneys fees. The attorney for the respondent has yet to show that he petitioned the court for attorneys fees and costs with clean hands.

The general rule in Illinois provides that a party is not entitled to recover attorneys fees unless an award is provided for by statute or an agreement of parties. (Amoco Realty Company v. Montalbano, 133 Ill. App. 3d 327, 334, 478 N.E. 2d 860, 865 (2nd Dist. 1985)). Absent statute or contractual agreement, attorneys fees, ordinary expenses and burdens of litigation are not recoverable costs to the prevailing party. (Galowich v. Beech Aircraft Corp., 92 Ill. App. 2d 157, 166, 65 Ill. Dec. 405, 409, 441 N.E. 2d 318, 322 (1982)). Attorneys fees are not taxable costs absent a contractual agreement. (Johnston v. Suckow, 55 Ill. App. 3rd 277, 280 12 Ill. Dec. 846, 849, 370 N.E. 2d 650, 653 (5th Dist. 1977)). Ordinary litigation expenses (Nagel v. Gerald Dennen & Co., 272 Ill. App. 3d 516, 525, 208 Ill. Dec. 853, 860 650 N.E. 2d 547, 554 (1st Dist. 1995)), attorneys fees and trial preparation costs are generally not recoverable by the prevailing party absent statutory provision. (State Farm Fire and Cas. Co. v. Miller Elec. Co., 231 Ill. App. 3d 355, 358, 172 Ill Dec. 890, 892 596 N.E. 2d 169, 171 (2d Dist. 1992)). The Board has a fiduciary duty to all homeowners to act reasonably and fairly. (Wolinski v. Kadison, 114 Ill. App. 3d 527, 535, 449 N.E. 2d 151, 157 (1st Dist. 1983)). The respondent must be objective, even-handed and non-discriminatory and must apply its rules uniformly. (Board of Directors of 175 East Delaware Place Homeowners Assn. v. Hinojosa 287 Ill. App. 3d at 890).

II. Pool Barriers

This question presented for review is one in which compliance of Village pool barrier requirements constitutes non-compliance of respondent's fencing restrictions. Compliance of respondent's fencing restrictions constitutes non-compliance of Village pool barrier requirements. The Village barrier requirements under section 421.10.1 are not only in conflict with Article VI section 6.02(d) fencing restrictions of respondent's

Declaration of Covenants but are also more stringent than the fencing regulations of the respondent.

There is no question that the in-ground pool barriers installed around the petitioner's pool did not conform to the fencing regulations of the respondent under Article VI section 6.02(d) and are in violation of said section. We contend that in light of the interpretation of the sections of Article VI of the Declaration of Covenants, one can readily reach a conclusion that there was no valid reason for the trial court to enjoin the petitioners to remove their Village-conforming pool barrier in its May 10, 2005 order.

Violation of Article VI section 6.02(d) cannot justify the Appellate Court's Rule 23 Order dated July 14, 2006 affirming the trial court's order. There was error of judgment on a question of law in resolving this matter in favor of the respondent by both the trial court and the Appellate Court who failed to take into account Article VI section 6.04 of the respondent's Declaration of Covenants which is as much an important part of the contract which is the law between the parties. Article VI section 6.04 provides: "In the event any ordinances of the Village of Lindenhurst are more **stringent** xxx or if any such ordinances **conflict** with any of the provisions hereof, the ordinances of the Village shall **prevail and control**." Reading both Article VI section 6.02(d) and section 421.10.1 of the BOCA Code would suggest a foregone conclusion that the latter is more stringent and in conflict with the former. And therefore the primacy of the Village ordinance, pursuant to Article VI section 6.04, should have been upheld.

The petitioners were brought to court by the respondent for enclosing their pool with fencing in violation of Article VI section 6.02(d). They were also brought to court on May 24, 2006 by

the Village of Lindenhurst in General Case Number 060V3794 for alleged violation of section 421.10.1 of the Boca National Building Code of 1996, caused by the respondent's removal of their BOCA-conforming barriers in compliance with the May 10, 2005 injunction of the trial court.

Whose barrier/fencing regulation must be recognized or be followed in the event of conflict was a question of law the court may not answer as a matter of discretion. It was a question of law that was authoritatively answered by Article VI section 6.04 of the respondent's Declaration of Covenants expressly providing for primacy of Village ordinances. There is no room for interpretation for the provisions in question are plain and are free of any doubt. The intention of the parties expressed in the contract had been thwarted by an incorrect interpretation dealing with questions of law.

The primacy of the Village ordinance was strengthened by the respondent itself when on January 7, 2000 its agent, Allan J. Kalman, wrote a letter addressed to the petitioners stating: "The fence style of the respondent's Reference Guide xxx refers to normal fencing which means perimeter fencing. xxx Fences **enclosing pools only** is a Village requirement, not an Association requirement. xxx The pool enclosure issue is a Village issue."

Until a writ of certiorari is granted by this Court, an until this Court sets aside the July 14, 2006 Rule 23 Order of the Illinois Appellate Court affirming the trial court's May 10, 2005 injunction order, the petitioners will always be defendants in actions by the Village or defendants in actions by the respondent simply because the state court's decisions on this fencing issue overruled the Village primacy provisions in Article VI section 6.04 of the respondent's Declaration of Covenants.

These considerations merit the granting of a writ of certiorari to right the wrongs committed in the proceedings of the lower courts and it is in the highest public interest to resolve the question of attorneys fees and costs by resolution to set a precedent for state courts in deciding similar cases uniformly.

Respectfully submitted,

Atanacio G. Sambrano

Cathleen R. Sambrano
(Petitioners)

Date 4/27/07

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This Order Is Not Precedential
And Is Not To Be Cited

No. 2-05-1102

FILED- JUL 14 2006
APPELLATE COURT
2nd DISTRICT

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ATANACIO G. SAMBRANO and CATHLEEN R. SAMBRANO,	)	Appeal from the Circuit Court of Lake County
Plaintiffs and Counterdefendants-Appellants,	)	
v.	)	No. 00-CH-981
HERITAGE TRAILS HOMEOWNERS ASSOCIATION,	)	
Defendant and Counterplaintiff-Appellee	)	Honorable David M. Hall, Judge, Presiding

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RULE 23 ORDER

The plaintiffs, Atanacio G. Sambrano and Cathleen R. Sambrano, appeal from a judgment of the circuit court of Lake County entered on the counterclaim of the defendant, the Heritage Trails Homeowners Association (Association). Among other things, the trial court ordered the Sambranos to

either remove a swimming pool from their property or enclose the pool with a fence in compliance with the Association's governing documents. The judgment also awarded attorney fees to the Association. We affirm.

Heritage Trails is a residential subdivision in the Village of Lindenhurst (Village) that was developed by Westfield Homes of Illinois, Inc, (the Developer).[1] The Association is a not-for-profit corporation established for various purposes, including the administration of architectural control over the subdivision and the maintenance of the subdivision's common areas. In March 1995, the Developer executed a declaration of covenants, conditions, restrictions, and easements (Declaration). Under the Declaration, the Developer retained the right to select the members of the Association's Board of Directors (Board) until the so-called "Turnover Date," defined as the earlier of the date when all lots in the subdivision were sold or the date on which the Developer gave written notice of its election to terminate its control. After the Turnover Date, homeowners would be entitled to elect the Board.

The Declaration also established an Architectural Review Committee (ARC) to advise the Board about proposals by homeowners for improvements on their properties. With some exceptions, homeowners must secure approval from the Board before constructing outdoor improvements. The approval process entails submitting construction plans to the ARC, which then reviews the plans and recommends that the Board either approve or disapprove them. The ARC may base its recommendation on aesthetic consideration, the proposed improvement's suitability to its surroundings, and the effect of the proposed improvement on the view from adjacent or neighboring properties. The Declaration provides that, prior to

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[1] Another developer, Ryland Homes, also participated in the development of the subdivision.

the Turnover Date, the Developer is the sole member of the ARC unless the Developer designates additional members. After the Turnover Date, the ARC was to consist of three members appointed by the Board.

The Declaration's architectural controls include restrictions on the type of fencing that may be constructed on a home site. Section 6.02(d) of the Declaration states that "[t]he only type of fencing allowed *** shall be 5 foot board on board type fencing constructed of cedar with at least 30% of the fence surface area consisting of open air." Section 6.03(a) provides, in pertinent part, that "[n]o*** chain-link or metal fences *** shall be erected, constructed or placed" on any property in Heritage Trails. A reference guide prepared for homeowners by the ARC explains that only "Shadow Box Style" fencing will be permitted. Section 6.04 of the Declaration provides that "[i]n the event any ordinances of the Village of Lindenhurst are more stringent, or if any such ordinances *** conflict with any of the provisions hereof, the ordinances of the Village *** shall prevail and control." In addition, section 8.07 of the Declaration provides that "[t]he failure by the Association*** to enforce any covenants or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter."

The Sambranos own a home situated on lot 43 in the subdivision. The recorded plat of the subdivision shows that the Sambranos' lot backs up against outlot 255, which the Declaration designates to be a common area. A pond that functions as a storm water management facility is located on outlot 255, but the waterline is not on the border with lot 43. Rather, there is dry land between the pond and the boundary line for lot 43.

On November 18, 1999, the Sambranos submitted plans for an in-ground swimming pool, surrounded by a wrought iron fence enclosing the pool, a wooden perimeter fence, a concrete deck, a wooden deck, and an additional driveway composed of crushed stone. The Association advised the Sambranos that, under the Declaration, the wood and concrete decks were excepted from the approval process. However, the Association refused the Sambranos' request to build a crushed stone driveway and a wrought iron fence. Noting that the Declaration permitted only wooden fencing, the Association asked the Sambranos to resubmit their plans with the appropriate type of fencing. The Association also noted that the Sambranos could submit plans for a paved driveway, but that the ARC had some concerns that the proposed driveway was too close to a neighboring property. The Association approved installation of a swimming pool, provided that the matter of a proper enclosure was resolved.

The Sambranos did not revise and resubmit their construction plans. Instead they proceeded with construction of the unapproved driveway, swimming pool, and wrought iron fence. During the construction of the swimming pool, dirt was dumped in the common area between the Sambranos' property and the pond. The Association sent the Sambranos written notice that they were in violation of the Declaration. After the pool was completed, the dirt was removed from the common area. However, the Sambranos landscaped the common area with trees, and other plants. The Sambranos also cut down cattails growing at the edge of the pond. The cattails and other natural vegetation around the pond helped to preserve the water quality. Indeed, the Board had previously debated whether to beautify the pond by removing the cattails and had decided not to do so. In June 2000, the Association's attorney wrote to Mr. Sambrano demanding, inter alia, that the landscaping on the common area, the swimming pool, and the fence be removed. The Sambranos did not comply, and on July 28, 2000, the Association's attorney

wrote to the Sambranos to advise them that on August 22, 2000, the Board would conduct a violation hearing to determine whether to fine the Sambranos for their infractions.

On August 18, 2000, the Sambranos filed a complaint seeking to enjoin the Association from conducting the violation hearing. The trial court refused to grant an injunction, and a violation hearing took place on September 19, 2000. Neither the Sambranos nor their attorney attended the hearing. The Board voted to assess the Sambranos $10 per day for each of five separate violations unless the violations were remedied within two weeks from September 27, 2000. On December 13, 2000, the Board approved a resolution providing, in pertinent part, as follows:

"All reasonable attorneys' fees incurred by the Association arising out of a default by any homeowner *** in the performance of any provisions of the governing documents of the Association, Rules and Regulations, or any applicable statute or ordinance, including, but not limited to the collection of assessments and fines, enforcing the covenants, By-Laws and Rules and Regulations or representing the Association relative to actions brought or threatened to be brought against it by homeowner shall be added to and deemed a part of said homeowner's respective share of the common expense."

Shortly thereafter, the Association filed a counterclaim for preliminary injunctive relief. The Association subsequently filed an amended counterclaim seeking a permanent injunction against the Sambranos' violations and ordering them to remove the unapproved driveway and fence and to restore the common area behind their home to its proper condition. In addition, the Association sought an order compelling the Sambranos to pay the accumulated assessments arising from their violations and to pay the Association's attorney fees. The Sambranos raised

several affirmative defenses including a defense of waiver based on the Association's alleged failure to enforce the fencing restriction against other homeowners with nonconforming fences. The Sambranos also asserted, as an affirmative defense, that the fencing restriction conflicted with the Lindenhurst Building Code, which permitted pool enclosure fences with vertical members spaces up to 4 inches apart and which permitted the use of materials other than wood. On the Association's motion, the trial court struck the latter affirmative defense.

On September 5, 2002, the trial court dismissed the Sambranos' complaint. The court later entered partial summary judgment for the Association, ruling that, pursuant to the Board's December 13, 2000, resolution, the Association would be entitled to an award of attorney fees if it prevailed on its counterclaim.

The matter ultimately proceeded to a bench trial on the counterclaim. In addition to presenting evidence concerning the violations on the Sambranos' property, the Association introduced evidence to refute the Sambranos' affirmative defense of waiver. According to the testimony of the Association's witnesses, there had been other instances in which homeowners erected fences that did not comply with the Association's governing documents. In most of the cases, the Association had demanded that the homeowner correct the problem and the homeowner had voluntarily complied. At the time of trial, however, there were three nonconforming fences in Heritage Trails in addition to the Sambranos'. One homeowner on a corner lot had a split rail fence; a Village ordinance precluded the construction of a shadow box fence because it would impede visibility and create a potential traffic hazard. Another homeowner had a four-foot high picket fence that had been approved by the Developer prior to the Turnover Date. A third homeowner was using chicken wire to fence off a vegetable

garden. The Association had issued a violation notice and had levied a $10-per-day assessment for the violation.

Peter Chiappori, the Village's chief building inspector, testified without objection that he had reviewed the Declaration's requirements for fencing and that a swimming pool enclosure could be constructed that complied with those requirements and also satisfied the requirements set forth in the Building Officials and Code Administrators' (BOCA) National Building Code (1996 Edition), which the Village had adopted by ordinance (see Lindenhurst Village Code §150.01 (amended March 9, 1998). According to Chiappori, several Heritage Trails owners had in fact built swimming pool enclosures that conformed to both the Village's requirements and the Association's.

The bench trial concluded on April 6, 2005. On May 10, 2005, the trial court entered a written order (1) enjoining the Sambranos from interfering with the right of the Association to maintain outlot 255 or the use and enjoyment of outlot 255 by other homeowners; (2) ordering the Sambranos to remove the wrought iron fence; (3) ordering the Sambranos to either remove the swimming pool or construct a fence conforming to the Association's rules; and (4) authorizing the Association to restore outlot 255 to its proper condition at the Sambranos' expense. The trial court continued the matter for a hearing to determine attorney fees and how much to fine the Sambranos for their violations. On May 16, 2005, the Sambranos filed a notice of appeal. This court dismissed the appeal for lack of jurisdiction on the basis that the May 10, 2005, order was not a final judgment. Heritage Trails Homeowners Ass'n v. Sambrano, No. 2-05-0489 (2006) (unpublished order under Supreme Court Rule 23).

On October 17, 2005, the trial court entered an order awarding the Association attorney fees and costs in the amount of

$53,570.30. The trial court also gave the Association leave to withdraw, without prejudice, its claim for penalties. This appeal followed.

The Sambranos first argue that they were entitled to construct a wrought iron enclosure for their pool because it is permissible under the Village's building code. According to the Sambranos, the building code controls over the Declaration. That is true, however, only when the building code is more stringent than, or is in conflict with, the Declaration. That is not the case here. As noted, the Association presented uncontradicted evidence, with no objection from the Sambranos, that it is possible to build a wooden pool enclosure that complies both with the Village's ordinances and with the Declaration.

The Sambranos also argue that there is a discrepancy between the Declaration and the homeowners' reference guide issued by the ARC. They contend that the Declaration specifically prohibits metal fences, while the reference guide makes no reference to metal fences. The argument in unpersuasive. The reference guide indicates that cedar is the only material that may used for fencing; thus the reference guide cannot be interpreted as permitting metal fencing.

According to the Sambranos, the Association is guilty of selective enforcement of the restrictions set forth in the Declaration. A party that selectively enforces a particular deed restriction or restrictive covenant may be found to have waived that restriction or covenant. See, e.g., VandeLogt v. Brach, 325 Ill App. 3d 847, 854 (2001) ("Where there has been acquiescence in prior violations of a particular restriction, the plaintiff's acquiescence will result in the waiver of any right to enforce the restriction"). However, minor violations do not preclude subsequent enforcement of the covenant. VandeLogt, 325 Ill. App. 3d at 855. Moreover, courts have generally concluded

that waiver occurs only after there has been acquiescence in multiple violations. Knolls Association v. Hinton, 71 Ill App. 3d 205, 209 (1979). Here, the record shows that the Association was generally vigilant in enforcing the restrictions set forth in the Declaration. Although it is true that the Board permitted a split rail fence on a corner lot, that fence was excepted from the requirements of the Declaration because it was subject to the more stringent requirements of a Village ordinance. Otherwise, the record shows that the Association permitted only a single nonconforming fence to be maintained-a four-foot picket fence approved by the Developer. This single violation is insufficient to give rise to a waiver. Moreover, the Declaration expressly provides that the failure to enforce any covenant or restriction shall not be deemed a waiver of the covenant or restriction.

The next issue is whether the trial court properly awarded attorneys fees to the Association. Although not a model of clarity, the Sambranos' argument appears to based, in part, on the premise that the Board exceeded its authority in adopting a resolution permitting it to collect attorneys fees, and that'the resolution was tantamount to an amendment of the Declaration. The Association argues that the resolution is a proper exercise of the Board's power under the Declaration. A homeowners, association may recover attorney fees for enforcing a restrictive covenant where the instrument creating the restriction so provides. See, e.g., Forest Glen Community Homeowners Ass'n v. Bishof, 321 Ill. App. 3d 298, 305 (2001); Amoco Realty Co. v. Montalbano, 133 Ill. App. 3d 327, 334-35 (1985). Additionally, statues in some states may give rise to the right to recover attorneys fees. See, e.g., Va. Code Ann. §55-515 (West ____). Our research has uncovered no cases in this state or elsewhere in which a homeowners' association was permitted to recover attorney fees based solely on a resolution. In at least one case, it was held that such a resolution was outside the scope

of a provision in a declaration of covenants, conditions, and restrictions authorizing enforcement of the by any proceedings at law or in equity. Campbell v. Lake Hallowell Homeowners Ass'n, 152 Md. App. 139, 150, 331 A.2d 465, 471 (2002). We conclude, however, that the Board acted within its authority in adopting the resolution. Article IV of the Declaration governs the Association's right to levy assessments on the homeowners. Section 4.01 provides that each owner of a lot "by acceptance of a deed therefore, *** shall be and is deemed to covenant and hereby agrees to pay to the Association such assessments as are levied pursuant to the provisions of this Declaration." Under section 4.02 of the Declaration,"assessments may be levied for the purpose of paying *** contractual expenses of administering the Association and enforcing the provisions of this Declaration, including without limitation, *** fees of attorneys." Finally, section 4.03 of the Declaration provides that "[t]he sums required to pay the costs described in Section 4.02 above shall be allocated equally among all the Lots or in such other reasonable manner as the Board may determine." (Emphasis added.) Here, the resolution determined that the cost of legal representation to enforce the Declaration should be borne by the homeowner whose violation made it necessary for the Association to obtain counsel. It is reasonable to allocate the cost of legal representation in this manner. Accordingly, the resolution is within the Board's power under Section 4.03.

The Sambranos complain that the resolution is "persecutory" because "it impose[s] a burden on the homeowners to pay for attorney's fees regardless of which side of the litigation the [Association] finds itself [sic]." It is true that the resolution permits the Association to collect attorney fees for actions it defends as well as those it prosecutes. But in any such case, the action must arise from a default by the homeowner in the performance of its obligations. Thus, there is no liability for attorney fees absent blameworthy conduct.

The Sambranos complain that the resolution is "persecutory" because "it impose[s] a burden on the homeowners to pay for attorney's fees regardless of which side of the litigation the [Association] finds itself [sic]." It is true that the resolution permits the Association to collect attorney fees for actions it defends as well as those it prosecutes. But in any such case, the action must arise from a default by the homeowner in the performance of its obligations. Thus, there is no liability for attorney fees absent blameworthy conduct.

The Sambranos also argue that it is unfair to hold them liable for attorney fees when Heritage Trails' governing documents did not provide for such liability at the time of the alleged violations. The Sambranos argue that it would be "equitably unfair" to apply the resolution retroactively. We disagree. We note that a homeowners association is not invariably forbidden from modifying rules applicable to existing uses of property. See Crest Builders, Inc. v. Willow Fall Improvement Ass'n, 74 Ill. App. 3d 420 (1979) (developer had no vested right to continue posting advertising signs on property after homeowners assumed control of the homeowners association and voted to prohibit such advertising). Moreover, any unfairness is significantly ameliorated because the Association has sought attorney fees incurred only after the resolution was adopted. At that point, the Sambranos were on notice that contesting the Association's counterclaim exposed them to possible liability for the Association's attorney fees. In addition, to the extent the Sambranos are seeking to invoke the court's equitable powers, the maxim that "he who seeks equity must do equity" (Sidwell v. Sidwell, 102 Ill. App. 3d 56, 59 (1981) is applicable. Here, by flouting the requirements of the Declaration, the Sambranos have failed to do equity.

The Sambranos' remaining arguments require only brief discussion. First, the Sambranos argue that the Developer conveyed outlot 255 to them. Suffice it to say that there is nothing in the record support this assertion, the plat of the subdivision shows that their lot does not extend to the waterline of the pond. Second, the Sambranos complain that the violation notices introduced into evidence by the Association were copies that had been altered and that contained handwriting that did not appear on the original notices they received. However, they fail to explain how the alleged alterations are of any significance to the outcome of the case. Third, the Sambranos assert that the trial court's written order of May 10, 2005, drafted by the Association's counsel, contains certain language that is different from the trial court's ruling. We find that the additional language is consistent with the oral ruling and is not erroneous. Fourth, the Sambranos contend that another Heritage Trails homeowner had submitted a request for approval of an improvement prior to the date the homeowner purchased the property. In support of the contention, the Sambranos cite an exhibit which is not part of the record. Matters outside the record cannot be considered on appeal. Skrypek v. Mazzocchi, 227 Ill. App. 3d 1, 4 (1992). In any event, it not at all clear what significance this discrepancy has to this case. Finally, the Sambranos accuse the Association of discriminating against them on the basis of their race or national origin. There is simply no evidence in the record whatsoever to support the charge.

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

GILLERAN JOHNSON, J., with BYRNE and KAPALA, JJ., concurring.

This Order Is Not Precedential And Is Not To Be Cited No. 2-05-0489 **FILED- JAN 26 2006** APPELLATE COURT 2nd DISTRICT

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HERITAGE TRAILS HOMEOWNERS ASSOCIATION, an Illinois not for profit, Corporation	)	Appeal from the Circuit Court of Lake County
Plaintiff- Appellee	)	
v.	)	No. 00-CH-981
ATANACIO SAMBRANO and CATHLEEN SAMBRANO,	)	Honorable David M. Hall
Defendants- Appellants	)	Judge, Presiding

RULE 23 ORDER

The defendants, Atanacio Sambrano and Cathleen Sambrano, appeal, pro se, from the May 10, 2005, order of the circuit court of Lake County finding them in violation of various rules of the plaintiff, the Heritage Trails Homeowners Association, and ordering them to remedy those violations. The trial court also found that the defendants were required to pay certain fines and

the plaintiff's attorney fees, but reserved determining how much the defendants would be obligated to pay until it conducted a hearing on that issue. On May 16, 2005, the defendants filed a notice of appeal. Because the order the defendants are appealing from is a non-final order, we dismiss this appeal for lack of jurisdiction.

The instant controversy arose after the defendant installed an in-ground swimming pool on their property without the approval of their Homeowners Association, the plaintiff. The defendants also installed a wrought-iron fence, a crushed stone driveway, and cut down vegetation and planted trees in a common area. All of this was done without the plaintiff's approval. Pursuant to the provisions of the Homeowners Association's agreement, if a member violated the rules of the agreement, that member would be subject to per diem fines and penalties and would obligated to pay the plaintiff's attorney fees incurred in enforcing its rules.

On April 6, 2005, following a trial and nearly five years of litigation, the trial court orally found that the defendants had violate the Homeowners Association's agreement by installing a wrought-iron fence and an in-ground swimming pool and using common area without the plaintiff's approval. The trial court found that the plaintiff had the right to remove all the improvements the defendants had made to common area. The trial court ordered that the defendants remove their fence within 45 days. The trial court also ordered that the defendants were to remove their swimming pool or to construct a fence that was in conformance with the plaintiff's rules and the ordinances of Lindenhurst.

The trial court additionally found that the plaintiff was entitled to its attorney fees for its seeking to have the defendants comply with the rules of the Homeowners Association. The trial court

further found that the plaintiff was entitled to fines for the defendants' violations of the Homeowners Association rules. The trial court explained that it would continue the matter for further hearing to determine the amount of attorney fees and fines that it would order the defendants to pay the plaintiff. The trial court explained that its order was "a final one in this stage of the proceeding." However, because it was continuing the matter for a hearing on the attorneys fees, the trial court explained that its order was not "a final order that would trigger a deadline for filing an appeal." In entering its order, the trial court did not enter any findings pursuant to Supreme Court Rule 304(a) (Official Reports Advance Sheet No. 22 (October 26, 2005), effective January 1, 2006).

On May 10, 2005, the trial court entered a written order consistent with its oral findings. On May 16, 2005, the defendants filed a notice of appeal.

Before addressing the merits of the defendants' appeal, we first consider our jurisdiction to consider the defendants' appeal. See Revolution Portfolio, LLC v. Beale, 341 Ill. App. 3d 1021, 1024-25 (2003) (reviewing court has a duty to consider sua sponte its jurisdiction and to dismiss an appeal if jurisdiction is wanting). For this court to have jurisdiction, the order of the trial court must be a final order unless it comes within the exceptions set forth by the Supreme Court Rules. Pottorf v. Clark, 134 Ill. App. 3d 349, 351 (1985). A final order terminates the litigation on the merits and settles all rights and obligations of the parties without leaving any matters of substantial controversy for subsequent resolution. Lincoln Towers Insurance Agency, Inc. v. Boozell, 291 Ill. App. 3d 965, 968 (1997). A claim for attorney fees must be resolved before appellate jurisdiction attaches unless the claim is collateral to the

underlying action. Cannon v. William Chevrolet/GEO, Inc., 341 Ill. App. 3d 674, 679 (2003).

Here, we do not believe that the order the defendants are appealing from is a final appealable order. The order did not settle all the substantial matters between the parties as it left open the issue of the amount of fines and attorneys fees that the defendant would be required to pay. The trial court specifically held that the defendants would be obligated to pay attorney fees and fines, but reserved determining how much the defendants would be obligated to pay until it conducted a hearing on those issues. The trial court also specifically informed the parties that its order was not final for appeal purposes.

Moreover, the issue of attorney fees was not collateral to the underlying action. The plaintiff's action against the defendants was based on the defendants violating the Homeowners Association agreement. This agreement included provisions requiring the payment of fines and the plaintiff's attorney fees if a member violated the agreement. The plaintiff requested its attorney fees and fines from nearly the outset of the litigation. Thus, the issue of the attorney fees was concomitant with the underlying action. Therefore, any judgment entered in the case before the claim for fees was ruled upon was nonfinal and nonappealable. Cannon, 341 Ill. App. 3d at 679. Because the order the defendants are appealing from is not final, we lack jurisdiction to consider the merits of their appeal. See Pottorf, 134 Ill. App. 3d at 351.

For the foregoing reasons, we dismiss the defendants' appeal.

Appeal dismissed.

GILLERAN JOHNSON, J., with BYRNE and KAPALA, JJ., concurring.

IN THE CIRCUIT COURT OF THE NINETEENTH CIRCUIT
LAKE COUNTY, ILLINOIS

FILED- MAY 10 2005
CIRCUIT CLERK
"s/Sally D. Coffelt"

HERITAGE TRAILS HOMEOWNERS ASSOCIATION, an Illinois not for profit corporation	)	No. 00 CH 981
Plaintiff	)	
v.	)	Judge Hall
ATANACIO SAMBRANO and CATHLEEN SAMBRANO,	)	
Defendants,	)	

ORDER

This matter coming to be heard for Trial, the Court having heard evidence, and after fully considering the evidence and arguments presented, the Court rules as follows and as per its Oral Ruling in open Court on April 6, 2005:

1. That Atanacio Sambrano's and Cathleen Sambrano's (hereinafter the "Sambrano's") property (Lot 43, 532 N. Madison Lane, Lindenhurst, IL) and the Sambranos, as members of the Heritage Trails Homeowners Association (hereinafter the "Association"), are bound by the terms of the Declaration, By-Laws, Rules and Regulations and Board Resolutions;
2. That by constructing their wrought-iron fence and additional crushed stone driveway in contravention of the Association's Architectural Review Board, and by using the common area identified as Outlot 255 to deposit fill, removing

cattail and other natural vegetation there from and by planting trees and other plant material thereon, the Sambranos have violated the Declaration and By-Laws, Rules and Regulations, and continue to violate the Declaration and By-Laws, Rules and Regulations, as long as the offending fence and appropriation of the common area continue;

3. That by paving the additional drive way, the Sambranos have complied with the terms of the Association's Declaration, By-Laws, Rules and Regulations;

4. That by installing and constructing the in-ground swimming pool on their property without receiving approval from the Association and the Architectural Review Board, the Sambranos are in violation of the Association's Declaration, By-Laws and Rules and Regulations;

5. That the Association shall be awarded its reasonable attorney's fees and costs, to be determined at a hearing on these issues;

6. That the amount of the Association's per diem fines and penalties against the Sambranos will be determined at a hearing on this issue;

7. That Atanacio Sambrano and Cathleen Sambranos are permanently enjoined from continuing to violate the Association's Declaration, By-Laws and Rules and Regulations;

8. That the Sambranos do not have any ownership interest in the property between their lot line and the edge of the pond on Outlot 255, except for those interests as members the Association who own a proportionate share of all of the Association's Common Elements;

9. That the Sambranos are permanently enjoined from in any way interfering with the Association's right to maintain, repair, use, enter upon otherwise be in control of the property between their lot line and the edge of the pond on Outlot 255;

10. That the Sambranos are permanently enjoined from in any way interfering or preventing each Owner (as defined in the

Heritage Trails Declaration) or member of employees from using and enjoying the Outlot 255, and specifically the property between the Sambranos lot line and the edge of the pond on Outlot 255;

11. That the Association has the right to remove the improvements installed on the property between the Sambranos lot line and the edge of the pond on Outlot 255 and the Association has the right to restore said area in their discretion. The Association will petition the Court for a determination of the reasonable costs of removing the improvements and restoring said property, and the Sambranos will be ordered to pay those amounts to be determined by this Court;

12. That the Sambranos are ordered to either remove the wrought iron metal fence constructed around their in-ground swimming pool by May 22, 2005, which is 45 days after April 6, 2005;

13. That the Sambranos are ordered to either remove the in-ground swimming pool on their property or construct a fence which conforms to the rules of the Association and the Lindenhurst Village ordinances. The Sambranos are further order to submit to the Architectural Review Board for the Association a request for either the removal of the in-ground swimming pool on their property or the construction of a fence which conforms to the rules and regulations of the Association and the Lindenhurst Village ordinances by May 22, 2005, which is 45 days after April 6, 2005;

14. That the Association shall have until June 1, 2005 to file its Petition For Attorney's Fees and Petition for Fines to Be Imposed. The Sambranos shall have until June 22 to respond thereto. Hearing on Plaintiff's Petition is set for July 7, 2005 at 1:45 p.m.

ENTERED
"s/ David M. Hall"
Judge

Prepared by:
Jason E. Orth (#06304256)
KOVITZ SHIFRIN NESBIT
750 Lake Cook Rd/#350
Buffalo Grove, IL 60089
(847) 537-0500

STATE OF ILLINOIS)
) ss
COUNTY OF LAKE)

FILED- OCT 17 2005
CIRCUIT CLERK
"s/Sally D. Coffelt"

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

Heritage Trails Homeowners Assoc.)
)
vs)
)
Atanacio Sambrano and Cathleen Sambrano)

Gen. No. 00 CH 981

ORDER

This matter coming to be heard for hearing on Plaintiff's First Interim Petition For Attorneys Fees and Costs and Expenses, due notice having been given to all parties, and Plaintiff's Counsel and Steve Cipolla appearing, and Atanacio Sambrano and Cathleen Sambrano not being present in Court and after the Court Conducted a hearing, heard evidence from Steven Cipolla, and considered Defendants' Response to Plaintiff's Petition it is hereby ordered that:

1. The Court Finds that the hourly rates charged by Kovitz Shifrin Nesbit are reasonable, and consistent with the hourly rates charged by law firms to Associations in the Northern Illinois area.

2. The work performed by Kovitz Shifrin Nesbit was reasonable and necessary.

3. The legal fees and costs incurred by the Association in this matter are both reasonable and necessary and they are customary for performance of similar types of tasks in the Northern Illinois legal Community.

4. That pursuant to this Court's April 6, 2005 and May 10, 2005 orders, the Association has the right and ability to recover its attorneys fees and costs from the Sambranos.

5. Judgment is entered in favor of the Association and against Atanacio Sambrano, Cathleen Sambrano and the premises commonly known as 532 Madison Lane, Lindenhurst, Illinois in the amounts of:

A) $48,732,75 in attorney's fees;
B) $ 4,837.55 in expenses and costs.

6. Plaintiff is given leave to withdraw w/out prejudice its claim for fines and penalties.

7. This order is enforceable instanter.

Dated at Waukegan, Illinois this
17TH day of October, 2005.

ENTER:
"s/ David M. Hall"
Judge

ORDER PREPARED BY: J. Orth/KSN
750 Lake Cook Rd/#350
Buffalo Grove, IL 60089

103228

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 29, 2006

Mr. Atanacio G. Sambrano
532 Madison Lane
Lindenhurst, IL 60046

No. 103228 – Atanacio G. Sambrano et al., petitioners, v. Heritage Trails Homeowners Association, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 4, 2007.

RESOLUTION OF THE BOARD OF DIRECTORS OF THE HERITAGE TRAILS HOMEOWNERS ASSOCIATION

We, the undersigned, representing a majority of the Directors of the Heritage Trails Homeowners Association, do hereby adopt the following Resolution and Rule and Regulation:

WHEREAS, the Heritage Trails Homeowners Association is empowered to enact Rules and Regulations relative to the conduct of its members; and

WHEREAS, the Board of Directors of the Heritage Trails Homeowners Association is charged with the responsibility of enforcing the aforesaid Rules and Regulations, together with the Declaration and By-Laws of the Association; and

WHEREAS, it is frequently necessary for the Board of Directors to utilize the services of legal counsel in order to facilitate the accomplishment of these tasks and duties; and

WHEREAS, the resulting attorneys' fees constitute an additional financial burden upon the resources of the Association; and

WHEREAS,the Board of Directors of the Heritage Trails Homeowners Association feel that it is reasonable for the individual whose conduct, necessitates the utilization of legal counsel to pay the costs of same;

NOW, THEREFORE, in furtherance of the above-stated determinations, objectives and goals, the Board, by Resolution, does hereby adopt the following:

1. All reasonable attorneys' fees incurred by the Association arising out of a default by any homeowner, his tenant, invitee or guest in the performance of any of the provisions of the governing documents of the Association, Rules and Regulations, or any applicable statute or ordinance, including, but not limited to the collection of assessments and fines, enforcing the covenants, By-Laws and Rules and Regulations or representing the Association relative to actions brought or threatened to be brought against it by the homeowner shall be added to and deemed a part of said homeowner's respective share of the common expense.

BOARD OF DIRECTORS OF THE HERITAGE TRAILS HOMEOWNERS ASSOCIATION

"s/ Sheldon Haltermann", Pres. 12/13/00
"s/ Jennifer D. Andrew", 12/13/00 – Vice-Pres.
"s/ Secretary "– 12/13/00

BY-LAWS ARTICLE VII
EXHIBIT B
Mar 15 1995

POWERS AND DUTIES OF THE BOARD

7.01 POWERS. The Board shall have power to:

(a) Adopt and publish rules and regulations governing the use, maintenance, repair, reconstruction, conservation and administration of the Common Area in accordance with all applicable codes, ordinances and regulations, and to establish and impose penalties for the infraction thereof, including, but not limited to, the penalties provided for in subsection (b) hereof:

(b) Suspend the voting rights of a Member for the period during which any assessment against his Lot remains unpaid and, after notice and hearing, for a reasonable period not to exceed sixty (60) days, for any infraction of published rules and regulations;

(c) Employ such employees as they deem necessary, and to prescribe their duties;

(d) Procure and maintain policies of public liability insurance in an amount that the Board in its discretion determines to be necessary and appropriate; and

(e) Exercise for the Association all other powers, duties and authority vested in the Association and not reserved to the membership by other provisions of these By-Laws or the Declaration.

7.02 DUTIES. It shall be the duty of the Board to:

(a) Cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the Members at the annual meeting , or at any special meeting when such statement is requested in writing by one-fourth (1/4) of the Members;

(b) Supervise all officers, agents and employees of the Association, and see that their duties are properly performed;

(c) As more fully provided in the Declaration, to:

(1) Fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period:

B-5
Document No. 3654002

421.10.1 Outdoor private swimming pool: An outdoor private swimming pool, including an in-ground, above-ground or on-ground pool, hot tub or spa shall be provided with a barrier which shall comply with the following.

1. The top of the barrier shall be at least 48 inches (1219 mm) above finished ground level measured on the side of the barrier which faces away from the swimming pool. The maximum vertical clearance between finished ground level and the barrier shall be 2 inches (51 mm) measured on the side of the barrier which faces away from the swimming pool. Where the top of the pool structure is above finished ground level, such as above-ground pool, the barrier shall be at finished ground level, such as the pool structure, or shall be mounted on top of the pool structure. Where the barrier is mounted on the pool structure, the opening between the top surface of the pool frame and the bottom of the barrier shall not allow passage of a 4-inch (102 mm) diameter sphere.

2. Openings in the barrier shall not allow passage of a 4-inch (102 mm) diameter sphere.

3. Solid barriers shall not contain indentations or protrusions except for normal construction tolerances and tooled masonry joints.

4. Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is less than 45 inches (1143 mm), the horizontal members shall be located on the swimming pool side of the fence. Spacing between vertical members shall not exceed 1-3/4 inches (44 mm) in width. Decorative cutouts shall not exceed 1-3/4 inches (44 mm) in width.

5. Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is 45 inches (1143 mm) or more, spacing between

vertical members shall not exceed 4 inches (102 mm). Decorative cutouts shall not exceed 1/3/4" (44 mm) in width.

6. Maximum mesh size for chain link fences shall be a 1-1/4 inch (32 mm) square unless the fence is provided with slats fastened at the top or the bottom which reduce the openings to not more than 1-/3/4 inches (44 mm).

7. Where the barrier is composed of diagonal members, such as a lattice fence, the maximum opening formed by the diagonal members shall be not more than 1-3/4 inches (44 mm).

8. Access gates shall comply with the requirements of items 1 through 7 of Section 421.10.1, and shall be equipped to accommodate a locking device. Pedestrian access gates shall open outwards away from the pool and shall be self-closing and have a self-latching device. Gates other than pedestrian access gates shall have a self-latching device. Where the release mechanism of the self-latching device is located less than 54 inches (1372 mm) from the bottom of the gate: (a) the release mechanism shall be located on the pool side of the gate at least 3 inches (76 mm) below the top of the gate; and (b) the gate and barrier shall not have an opening greater than 1/2 inch (13 mm) within 18 inches (457 mm) of the release mechanism.

9. Where a wall of a dwelling unit serves as part of the barrier and contains a door that provides direct access to the pool, one of the following shall apply:

9.1 All doors with direct access to the pool through that wall shall be equipped with an alarm which produces an audible warning when the door and its screen, if present, are opened. The audible warning shall commence not more than 7 seconds after the door and door screen, if present, are opened and shall sound continuously for a minimum of 30 seconds. The alarm shall have a minimum sound pressure rating of 85 dBA at 10 feet (3048 mm) and the sound of the alarm shall be distinctive from other household sounds such as smoke alarms, telephones and door bells. The alarm shall automatically reset

under all conditions. The alarm shall be equipped with manual means, such as touchpads or switches, to deactivate temporarily the alarm for a single opening from either direction. Such deactivation shall last for not more than 15 seconds. The deactivation touchpads or switches shall be located at least 54 inches (1372 mm) above the threshold of the door.

9.2 All doors with direct access to the pool through that wall shall be equipped with a self-closing and self-latching device with the release mechanism located a minimum of 54 inches (1372 mm) above the floor. Swinging doors shall open away from the pool area.

9.3 The pool shall be equipped with a power safety cover. Where in a closed position, the cover shall be capable of holding a weight of 485 pounds (2157 N), shall not have any openings that allow passage of a 4-1/2 inch (114 mm) sphere and shall incorporate a system to drain standing water that collects on the cover. The cover control switch shall be permanently installed in accordance with NFPA 70 listed in Chapter 35, and be key-operated and of a spring loaded or momentary-contact type. Where the switch is released, the operation of the cover shall stop instantly and be capable of reversing direction immediately. The switch shall be in the line of sight of the complete pool cover.

10. Where an above-ground pool structure is used as a barrier or where the barrier is mounted on top of the pool structure, and the means of access is a fixed or removable ladder or steps, the ladder or steps shall be surrounded by a barrier which meets the requirements of items 1 through 9 of Section 421.10.1. A removable ladder shall not constitute an acceptable alternative to enclosure requirements.

ARTICLE VIII

Miscellaneous

8.01 Severability: Invalidation of all or any portion of any of the covenants, restrictions, easements, conditions, reservations, liens and charges imposed by this Declaration, by legislation, judgment or court order shall in no way affect any other provisions of this Declaration which shall remain in full force and effect.

8.02 Amendment: The provisions of this Declaration may be amended by an instrument executed by not less than seventy-five percent (75%) of the Members; provided, however, during such time as the Declarant is an Owner of any Lot, provisions relating to the rights and obligations of Declarant and Developer may not be amended without the written consent of Declarant and Developer. The responsibility for continued maintenance, operation and preservation of the Common Area shall not be abrogated by any such amendment. In Addition, any amendment of any part of Articles III, VI, or VIII shall require the prior written approval of the Village.

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS
VILLAGE OF LINDENHURST

Case. No. 060V3794
FILED- May 24 2005
CIRCUIT CLERK
"s/Sally D. Coffelt"

COMPLAINT AND NOTICE TO APPEAR

Complaint and information by PETER CHIAPPORI, the Building Inspector of the Village of Lindenhurst, hereinafter called the Complainant, being duly sworn, on oath says that on or prior to the 12th day of May, 2006, in the Village of Lindenhurst, Lake County, hereinafter called the Defendant, committed the following violation:

COUNT 1: Failed to construct a barrier around his in-ground swimming pool in violation of Section 421.10.1 of the BOCA National Building Code.

THE DEFENDANT MUST APPEAR FOR TRIAL ON THE ABOVE RECITED VIOLATION ON JUNE 7, 2006 AT 1:30 P.M. AT THE LAKE COUNTY CIRCUIT COURT LOCATED AT 1792 NICOLE LANE IN ROUND LAKE BEACH, ILLINOIS.

NOTICE: IF YOU FAIL TO APPEAR IN COURT ON THE ABOVE DATE AND TIME, THE VILLAGE WILL REQUEST THAT THE COURT ISSUE A WARRANT FOR YOUR ARREST FOR FAILING TO APPEAR PURSUANT TO THIS COMPLAINT AND NOTICE TO APPEAR.

Under penalties as provided by law for oral certification pursuant to Section 1-109 of the Code of Civil Procedure and perjury pursuant to Section 32-2 of the Criminal Code of 1961, the undersigned certifies that the statements set forth in this instrument are true and correct.

"s/ PETER CHIAPPORI", Complainant
Building Inspector for the
Village of Lindenhurst
2301 East Sand Lake Road
Lindenhurst, Illinois 60046
847-356-8252

"s/Cindy Spangler"
Subscribed and sworn to before me
this 12th day of May, 2006.
NOTARY PUBLIC

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT
LAKE COUNTY

(Name all parties)	)	
	)	
VILLAGE OF LINDENHURST,	)	
	)	No .060V3794
Plaintiff	)	
vs.	)	
	)	
ATANACIO SAMBRANO,	)	
	)	Amount Claimed $ _____
Defendant	)	

SUMMONS

To each defendant:

YOU ARE HEREBY SUMMONED and required to appear before the court at the Round Lake Beach Courthouse, 1792 Round Lake, Illinois at 1:30 P.M., on June 7, 2006 to answer the complaint in this case, a copy of which is hereto attached. IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF ASKED IN THE COMPLAINT.

To the officer:

This summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and if any, immediately after service and not less that 3 days before the day for appearance. If service cannot be made, this summons be returned so endorsed.

This summons may not be served later than 3 days before the day for appearance.

WITNESS_____,2006

(Seal of Court) "s/Salley D. Coffelt"
Clerk of the Circuit Court
"s/Tracie P."
(Deputy)

(Plaintiff's attorney or plaintiff if he or she is not represented by an attorney)

Name JEFFREY J. NUTSCHNIG/SOFFIETTI, JOHNSON, TEEGEN, PHILLIPS, MOROZIN & ARGUETA, LTD.
Attorney for Plaintiff
Address 74 E. Grand Ave., P.O. Box 86
City Fox Lake, IL 60020-0086
Telephone 847-587-2551

NOTICE TO DEFENDANT

IF YOU WISH TO CONTEST THIS CLAIM, you must do the following:

(A) Pay the statutory appearance fee (NO PERSONAL CHECKS ACCEPTED).

(B) File a written appearance (forms may be obtained at the main office of the Clerk of the Circuit Court) on or before the day and time specified for appearance, hereinafter called the return day.

(C) Mail or otherwise deliver to the plaintiff's attorney or the plaintiff if there is no attorney, a copy of your appearance.

(D) If the appearance is timely filed and the fee paid, you are NOT required to appear in court in person on the return day, instead you should be present in court at the specified address prepared to proceed to trial at the same time on the 14th day after the stated return day.

In the event the trial day falls on a court holiday, the trial shall be held on the next earliest court day following said court holiday.

IF YOU DO NOT WISH TO CONTEST THIS CLAIM, you need not appear in person or file a written appearance and a judgment will be entered against you on the return day for the amount claimed by the plaintiff in the complaint plus court costs.

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(2)

No. 06 – 1450

FILED
OCT 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ATANACIO G. SAMBRANO
and CATHLEEN R. SAMBRANO,
Petitioners

v.

HERITAGE TRAILS HOMEOWNERS ASSOCIATION,
An Illinois not-for-profit corporation,
Respondent

On Petition For A Writ Of Certiorari
To The Appellate Court of Illinois
Second Judicial District

PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

ATANACIO G. SAMBRANO, PE
CATHLEEN R. SAMBRANO, RN
(Pro se)
532 MADISON LANE
LINDENHURST, ILLINOIS 60046
TEL.NO: (847) 265-6992

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PETITION FOR REHEARING FROM DENIAL OF PETITION FOR A WRIT OF CERTIORARI

This case involves primordial multiple conflicts of lower court orders on similar facts and same issues. Petitioners will address these conflicts on substantial grounds et seq, in this Petition for Rehearing of the October 1, 2007 Order of this Court denying their Petition for a Writ of Certiorari.

Conflict #1

There is unsettling conflict between the order entered by the Court of Special Appeals of Maryland in the case of Brian Campbell ET UX v. Lake Hallowell Homeowners Association (Case #1197) and the order issued by the Illinois Appellate Court Second Judicial District in the case between the Petitioners and Respondent (Case #2-05-1102). The Maryland Appellate Court **denied** the award of attorney's fees under a resolution that was improperly passed by the Board of Directors of the Homeowner's Association. The Illinois Appellate Court **granted** the award of attorney's fees under a resolution that was improperly passed by the Respondent's Board of Directors. The December 13, 2000 resolution of the Respondent's Board was an amendment in violation of the amendatory provisions of the Respondent's Declaration of Covenants, Conditions and Restrictions.

Resolution of this **conflict** by certiorari is of considerable importance for a division of legal authority or split of authority on a significant question of law involving same facts and same issues would set the

momentum for double standard, selective justice and judicial lottery in the lower courts. Without a precedent, which this Court has a constitutional duty to establish as a standard in black and white, nothing can stop homeowner associations everywhere from passing one-sided midnight resolutions obligating a complaining pro se homeowner to pay all cost of litigation win or lose. Without a precedent, nothing can likewise stop the lower courts from opting between the Maryland and Illinois Appellate rulings in deciding cases of similar nature.

Dispensation of equal justice is the biggest issue confronting any court in every jurisdiction. Double standard, selective justice and judicial lottery borne out of conflicting judgments are the greatest judicial tragedies pro se petitioners face in their struggle for equal justice under the law. A wrong cannot be cured by another wrong. Denial of Writ of Certiorari is a stalemate that did not redress the unjust consequences inherent in conflicting orders of the lower courts. Denial of the Writ won't correct the injustice done to the pro se Petitioners in a proceeding that is a respecter of persons. While the Maryland court looked at the issues, the Illinois court looked at the size of the persons.

A grant of the Writ will be in keeping with equal justice under the law. This isolated injustice done to the Petitioners may not be worthy to deserve discussion in this high court in ways to deny the Writ of Certiorari. But the far-reaching implications of double-standard, selective justice and judicial lottery ensuing out of inconsistent orders of the Appellate Courts are undoubtedly substantial grounds to grant the Writ of Certiorari. Such a grant to resolve the gridlock is in

the highest public interest as it would establish a rule for future conduct and a nationally uniform understanding. Conversely, a denial does more harm than good for failing to correct the substantial irregularities of the lower courts in the administration of the justice system.

Conflict #2

There is an event not previously presented in this case. On **May 7, 2007** the Appellate Court of Illinois Second Judicial District entered its Rule 23 Order in Case No. 2-06-0853 between the Village of Lindenhurst v. Atanacio G. Sambrano (see A-32 Petition for A Writ). The Rule 23 Order of May 7, 2007 is in conflict with its previous Rule 23 Order of July 14, 2006 in Case No. 2-05-1102 between the Petitioners and the Respondent (see A-1 Petition for A Writ).

In its Rule 23 Order of July 14, 2006, the Appellate Court **upheld** the Respondent's pool fencing regulations which are clearly in conflict with the fencing requirements of the Village of Lindenhurst. In its Rule 23 Order of May 7, 2007, the Appellate Court likewise **upheld** the fencing requirements of the Village of Lindenhurst which are in conflict with the pool fencing regulations of the Respondent. These self-contradicting Rule 23 Orders of the Illinois Appellate Court put the Petitioners in a bind and in a box. They are harmful irregularities that undermined the justice system this Court has a constitutional authority and duty to rectify.

With these conflicting Rule 23 Orders from the same Appellate Court in effect, the pro se Petitioners

will forever be held in violation by either the Respondent or the Village of Lindenhurst no matter which pool fencing requirements they must follow for their in-ground swimming pool. Without a grant of a Writ, there are no existing independent and adequate state grounds of relief the Petitioners can avail of to free themselves of violation for either of the two Rule 23 Orders of the Appellate can be used against them. A grant of the Writ of Certiorari would thwart the far-reaching implications of double-standard, selective justice and judicial lottery in Conflict #1. The grant of the Writ would correct the irreparable injustice conflicting orders have caused to the Petitioners in Conflict #2.

The Petitioners pray that a Writ of Certiorari be granted in light of Conflict #1 and Conflict #2.

Respectfully submitted:

Atanacio G. Sambrano, PE
Petitioner (Pro se)

Cathleen R. Sambrano, RN
Petitioner (Pro se)